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83-1047

NO.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

FRANKLIN JEFFERSON,
Petitioner,

VS.

JOHN O. MARSH, JR.,
~~MARTIN R. HOFFMANN~~, in his capacity as Secretary of the Army, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court, in awarding fair and reasonable attorneys' fees for a prevailing plaintiff in a Title VII employment discrimination case, is required to calculate the number of hours reasonably expended on the litigation and to determine a reasonable hourly rate.

2. Whether a district court, in awarding fair and reasonable attorneys' fees for a prevailing plaintiff in a Title VII employment discrimination case, is required to articulate clear and concise explanations of its reasons for the fee award.

PARTIES TO THE PROCEEDING BELOW

All parties appear in the caption of the case in the United States Supreme Court.

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

FRANKLIN JEFFERSON,

Petitioner,

vs.

MARTIN R. HOFFMANN, in his capacity as Secretary of the Army, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, FRANKLIN JEFFERSON, respectfully seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, entered on September 28, 1983.

OPINIONS BELOW

The unpublished memorandum decision of the Court of Appeals and its subsequent order denying the petition for rehearing were not reported. Said memorandum is reproduced in Appendix A, infra, A-1 - A-2, of this Petition. Said order is reproduced in Appendix B, infra, B-1 - B-2, of this Petition. The opinion of the district court was also not reported and is reproduced in Appendix C, infra, C-1 - C-11, of this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra, A-1 - A-2) was entered on July 13, 1983. A timely petition for rehearing en banc was filed on July 27, 1983, and subsequently denied on September 28, 1983 (Appendix B, infra B-1 - B-2). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 2000e-5k which provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission of the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF CASE

This case involved a Title VII action filed by Franklin Jefferson (hereinafter "Petitioner") to redress alleged racial discrimination occurring during the course of his employment as a crane operator with the United States Army Corps of Engineers since 1971.

On January 5, 1977, Petitioner brought this action against the Secretary of the Army and the U.S. Army Corps of Engineers in the United States District Court for the District of Oregon, alleging a variety of

discriminatory actions and practices against him on account of his race and color, Black, under Title VII of the Civil Rights Act of 1964, as amended, (1972), 42 U.S.C. § 2000e, et seq. In December, 1977, Defendants initiated action to terminate Petitioner's employment for alleged failures to properly perform his duties. However, in February, 1978, the district court granted Petitioner's Motion for Preliminary Injunction restraining Defendants from terminating his employment.

Petitioner's matter came to trial on January 25, 1979, and concluded on January 31, 1979. On April 30, 1979, an opinion of the district court was filed, which, among other things, found that Petitioner established a prima facie case of employment discrimination, and that Defendants failed to rebut it by articulating legitimate non-discriminatory reasons justifying its action. In August, 1979, a subsequent opinion was entered by the court, finding that Petitioner

was entitled to recover the following:

1. 364 hours of accumulated sick leave;

2. 240 hours of accumulated annual leave;

3. the sum of $4,658.60;

4. the sum of $366.21; and

5. the sum of $1,220.00.

Said opinion also dissolved the Preliminary Injunction.

In September, 1979, pursuant to instructions from the court, Petitioner filed his Motion for Award of Attorneys' Fees in the amount of $90,752.70. On November 19, 1979, the district court issued its final judgment (which included the above relief), allowing attorneys' fees in the amount of only $6,000.00 and disregarding claims for costs and expenses incurred by Petitioner's counsel.

On January 9, 1980, soon after final judgment, Defendants once again sought to terminate Petitioner's employment. However,

the court granted Petitioner's Temporary Restraining Order and issued an Order to Show Cause restraining Defendants from terminating him. Defendants thereafter agreed to withdraw its administrative action to terminate Petitioner's employment and moved to dissolve said Temporary Restraining Order and Order to Show Cause. On February 25, 1980, an order of the court was entered dissolving said Temporary Restraining Order and Order to Show Cause.

On January 18, 1980, both Petitioner and Respondents filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment issued by the district court on November 19, 1979. Thereafter, on May 21, 1980, upon Defendant's motion, the court dismissed Defendants' appeal.

Petitioner appealed, among other things, the district court's judgment limiting the award of his attorneys' fees to $6,000.00.

The opinion of the Ninth Circuit Court of Appeals in that appeal (No. 80-3035) was filed on September 2, 1981, remanding this matter to the district court solely for its articulation and resolution of the guidelines outlined in Kerr vs. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied sum nom, 425 U.S. 951 (1976), in setting the award of attorneys' fees. Subsequent thereto, a writ of mandate was issued to the district court by the United States Court of Appeals for the Ninth Circuit.

On November 24, 1981, by order of the district court, a status conference was held for the determination of further proceedings regarding attorneys' fees. At the status conference, the Honorable Robert C. Belloni, District Court Judge, allowed the parties to file supplemental memoranda in connection with Petitioner's request for attorneys' fees, costs and expenses. However, on Jan-

uary 18, 1982, Judge Belloni issued an opinion which once again limited Petitioner's award of attorneys' fees to $6,000.00. Petitioner, in filing his supplemental memoranda, had requested some $112,000.00 in attorneys' fees. The district court also disregarded all claims for costs and expenses by Petitioner's attorneys.

On March 18, 1982, Petitioner again filed a notice of appeal of said opinion limiting Petitioner's award of attorneys' fees to $6,000.00. On July 5, 1983, the United States Court of Appeals for the Ninth Circuit once again held oral arguments on Petitioner's matter. Subsequent thereto, on July 13, 1983, the court of appeals filed a memorandum decision affirming the judgment of the district court.

On July 27, 1983, Petitioner duly filed a Petition for Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit. On September 28, 1983, the

Ninth Circuit filed its Order (Appendix B, infra, B-1 - B-2) denying the Petition for Rehearing En Banc.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT ON IMPORTANT ISSUES AFFECTING A PREVAILING ATTORNEY'S RIGHT TO ATTORNEYS' FEES IN CIVIL RIGHTS CASES.

A. The District Court Failed To Calculate Fair And Reasonable Attorneys' Fees In This Title VII Employment Discrimination Case In That It Determined Neither A Reasonable Number Of Hours Nor A Reasonable Rate To Be Allowed As Required By This Court's Decision in Hensley vs. Eckerhart, ___ U.S. ____, 76 L.Ed.2d 40, 51 U.S.L.W. 4552, (May 16, 1983).

The district court's limited award of $6,000.00 in attorneys' fees is arbitrary, improper, and clearly contrary to the explicit standards of the decision of this Court in Hensley vs. Eckerhart, ___ U.S. _____, 76 L.Ed.2d 40, 51 U.S.L.W. 4552, (May 16, 1983), adopting and approving the well established decision in Johnson vs. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), and the decision in Cope-

land vs. Marshall, 641 F.2d 890 (D.C. Cir. 1980), requiring a calculation of attorneys' fees. This requirement seems obvious in that it appears that no rational determination of a reasonable fee award can be made without being based upon some appropriate calculation.

Petitioner's case consisted of administrative proceedings and three years of very difficult litigation, precipitated by unprecedented non-stop hostility and threats of violence against Petitioner during his tenure of employment with defendants.

The district court issued judgment in favor of Petitioner who prevailed on substantially all claims against defendants. However, despite the long and arduous litigation, and the considerable time and effort expended by Petitioner's two attorneys of record, the district judge, without comment, awarded only $6,000.00 in attorneys' fees. Petitioner had requested $90,752.70.

Upon denial of said limited award to the

United States Court of Appeals for the Ninth Circuit, the court remanded said case to the district court for application of the guidelines outlined in Kerr vs. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), for a determination of Petitioner's request for reasonable attorneys' fees. Jefferson vs. Hoffmann, et al., C.A. No. 80-3035, decided September 2, 1981.

On remand, the district court once again limited its attorneys' fee award to $6,000.00 which is little more than five percent (5%) of the amount calculated and sought by Petitioner's counsel upon conclusion of trial. The district court neither calculated nor purported to calculate reasonable attorneys' fees to be allowed Petitioner's attorneys. Thus, said inaction by the district court provided no basis for meaningful review by the Court of Appeals. In fact, the district court went so far as to state that "it was not

necessary to make detailed findings and precise calculations". (Appendix C, infra, C-1 - C-11)

The United States Court of Appeals for the Ninth Circuit, in its brief memorandum decision of July 13, 1983, stated that the district court's determination of attorneys' fees was appropriately guided by the Kerr factors and it could not say that the district court abused its discretion in setting Petitioner's attorneys' fees at $6,000.00. This holding seems clearly wrong in that it allows the district court to set attorneys' fees without even calculating what those fees are. It invites the district court to arbitrarily set attorneys' fees without consideration of the most important Kerr factors, a calculation of a reasonable fee for work that was performed. At best, the district court's determination here is fatally deficient.

Most importantly, the district court's

decision conflicts with this Court's decision in Hensley vs. Eckerhart, ___ U.S. ____, 76 L.Ed.2d 40, 51 U.S.L.W. 4552 (May 16, 1983), which held that:

> "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly."

The district court here utilized no calculation scheme whatever. In essence, it simply and generally stated that time spent and fees charged by Petitioner's attorneys were unreasonable, without specifying its basis therefor. Thus, on this basis alone, the United States Court of Appeals for the Ninth Circuit should have reversed and remanded Petitioner's case again to the district court for a calculation of reasonable

attorneys' fees.

B. The District Court Failed To Properly Award Fair And Reasonable Attorneys' Fees In This Title VII Employment Discrimination Case In That It Failed To Articulate Clear And Concise Explanations Of Its Reasons For The Attorney Fee Award Of $6,000.00.

The decision by this Court in Hensley vs. Eckerhart, ___ U.S. ____, 76 L.Ed.2d 40, 51 U.S.L.W. 4552, (May 16, 1983), requires the district court to articulate clear and concise explanations of its reasons for the attorney fee award. In doing so, this Court stated that the district court may consider the following guidelines set forth in Johnson vs. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974):

1. time and labor involved;

2. the novelty and difficulty of the questions;

3. the skill required to perform properly the legal service;

4. the preclusion of other employment

by the attorney due to acceptance of the case;

5. the customary fee;

6. whether the fee is fixed or contingent;

7. time limitations imposed by the client or the circumstances;

8. the amount involved and the results obtained;

9. the experience, reputation, and ability of the attorneys;

10. the undesirability of the case;

11. the nature and length of the professional relationship with the client; and

12. awards in similar cases.

The district court need not specifically discuss all twelve factors in every case, but is must discuss those factors that are called into question by the case and necessary to wupport the reasonableness of the fee awarded. Copeland vs. Marshall, 641 F.2d

880, 892 (D.C. Cir. 1980); Manhart vs. City of Los Angeles, et al., 652 F.2d 904, 907 (9th Cir. 1981); Rivera vs. City of Riverside, 679 F.2d 795, 796-97 (9th Cir. 1982); Moore vs. Jas. H. Matthews and Co., 682 F.2d 830, 838-39 (9th Cir. 1982). Furthermore, these factors are flexible guidelines and need not be applied mechanically; those guidelines which bear greater relevance to the issues tried should be given more consideration. Seymour vs. Hull and Moreland, 605 F.2d 1105 (9th Cir. 1979).

The district court gave only passing commentary to the Kerr guidelines (adopted from Johnson). In considering only a few of the guidelines, the district court failed miserably by making superficial, unsubstantiated findings rather than sound objective evaluations of the evidence in the record to support its award. In resetting the $6,000.00 award, the district

court presented a cursory and erroneous analysis of (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the customary fee; (4) the amount involved and the results obtained; (5) the skill requisite to perform the legal services properly; and (6) the attorneys' experience, reputation and ability.

With a clear eye to the interdependence of some of the factors, Petitioner discusses each of the relevant factors herein in relation to the district court's cursory examination.

The time and labor involved. The district court found that Petitioner's attorneys spent too much time and labor on his case, and that there was a great duplication of effort. (Appendix C, infra, C-4 - C-6) Such contentions are completely without merit. Petitioner hired two attorneys, one local and the other out-of-state, to handle

his employment discrimination case. Petitioner's attorney, Oler, commenced representation at the administrative level, continuing through a temporary restraining order, preliminary injunction, pre-trial motions, status conferences, trial, second temporary restraining order, appeal, and remand on appeal. Mr. Raines' firm associated as local counsel and began substantial representation when Petitioner sought his second restraining order against defendants.

Petitioner called on his attorneys many times to protect him from the pervasive discriminatory practices of defendants. In that regard, Petitioner suffered intense distress as a result of the hostile, discriminatory environment. Thus, Petitioner's case was difficult to litigate.

The district court specifically accused Petitioner's attorneys of spending too much time answering interrogatories, reviewing court documents, and conferring with the

client. (Appendix C, infra, C-4 - C-5) These services have clearly not been duplicative, and there has been no evidence presented to the contrary. It seems surprising that defendants, who had two lawyers working on the same side should claim that it is inefficient to have two lawyers working on the same side, particularly when the other side is the prevailing party. Even though hindsight would suggest fewer hours might be necessary to achieve the same result, counsel is entitled to the full award if their efforts have reasonably forwarded Petitioner's cause. Dennis vs. Chang, 611 F.2d 1303 (9th Cir. 1979). The necessary hours of reasonable representation, as well as the appearances, have been carefully outlined by Petitioner's counsel in their affidavits supporting the request for attorneys' fees and costs. Formal time records are unnec-

essary so long as the actions are reasonably calculated to forward Petitioner's cause. Gluck vs. American Protection, 619 F.2d 30 (9th Cir. 1980).

The novelty and difficulty of the questions involved. The district court concluded that the questions involved in Petitioner's case were not very difficult. (Appendix C, infra, C-4 - C-6) While the questions involved in Petitioner's case were not overly novel, they were nontheless made more difficult by the administrative findings against Petitioner, which were substantive evidence against him. Likewise, Petitioner was hampered with the difficulty of recalcitrant supervisors, who went so far as to screen out calls from EEO counselors. The dramatically different recounting of factual events between Petitioner's witnesses and the defendants was a contributing factor to the difficult

factual questions involved.

The amount involved and the results obtained. The district court, without foundation, erroneously concluded that Petitioner's attorneys were not very successful in prosecuting his case. However, Petitioner's attorneys can point to three critical areas of victory: (1) a judicial determination that Petitioner suffered from invidious discrimination at the hands of defendants, (2) maintenance and continuance of his employment from January, 1978, to the present valued in excess of $1,000,000.00, if Petitioner continued to work for the next 25 years, and (3) restoration of some lost benefits valued in excess of $15,000.00. The monetary valuation for Petitioner's job does not begin to include medical and retirement benefits. Thus, Petitioner's request for some $112,000.00 in attorneys'

fees is reasonable in light of the ultimate economic benefit received by Petitioner.

The experience, reputation and ability of the attorneys. The district court categorically concluded that the representation received by Petitioner was unusually bad. (Appendix C, infra, C-7) The fact of the matter is that Petitioner's senior counsel, Oler, of San Francisco, is a member of the state bars of California, Idaho, Texas, Illinois, and the federal bars of the Northern District of California and the United States Court of Appeals for the Ninth Circuit. He has practiced law since 1957 and is experienced, and regularly litigates Title VII cases. Oler also enjoys an excellent reputation as a trial lawyer.

Petitioner's local counsel, Keith R. Raines, is a member of the bar of Oregon and the federal bars for the District of Oregon and the United States Court of Appeals for

the Ninth Circuit, having practiced since 1976. He has been heavily involved in Title VII litigation, having tried five other such cases before Petitioner's case.

Thus, Petitioner's two attorneys were more than amply qualified and capable of handling his case. In fact, Petitioner wonders how the district court could characterize the representation as unusually bad when he won his case. The district court never stated in what respect the representation of Petitioner was unusually bad.

In sum, the district court failed to properly articulate clear and concise explanations of its reasons for the limited $6,000.00 fee award in Petitioner's case as required by this Court in Hensley vs. Eckerhart, ___ U.S. ____, 76 L.Ed.2d 40, 51 U.S.L.W. 4552 (May 16, 1983). As a result, the Ninth Circuit Court of Appeals should have reversed and remanded Petitioner's

case to the district court for a proper and objective articulation of those guidelines.

CONCLUSION

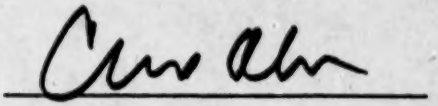
Simply stated, Petitioner's case presents the issue of whether the district court, in determining attorneys' fees for a prevailing plaintiff in a Title VII case, is required to articulate clear and concise reasons for its fee award, and calculate the hours reasonably expended, multiplied by a reasonably hourly rate. This Court's decision in Hensley vs. Eckerhart, supra, would appear to mandate such an articulation and a mathematical calculation of the fee. In doing so, the district court should consider all or some of the guidelines as appropriate, as outlined in Johnson vs. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). In Petitioner's case, the district court arbitrarily set and

limited his attorneys' fees to $6,000.00, even though Petitioner presented documented itemizations to support his request for some $112,000.00 in attorneys' fees. In 1968, this Court, in Neuman vs. Piggie Park Enterprises, Inc., 390 U.S. 400, stated the amount of the award in Title VII cases "should not be no niggardly that the award would discourage others seeking to attack discriminatory practices. The trial court must consider the congressional objectives of giving victims of discrimination access to the courts when determining appropriate fee awards." Here, the district court gave only $6,000.00 in attorneys' fees without properly articulating any factors or making a calculation to support its award.

For the reasons set forth above, it is respectfully submitted that this Petition

for Writ of Certiorari should be granted.

Respectfully submitted,



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VERIFICATION

I, CURTIS G. OLER, declare:

I am an attorney at law duly admitted and licensed to practice before all courts of the State of California, and I have my professional offices at One Haight Street at Market, Post Office Box 15083, San Francisco, California 94115.

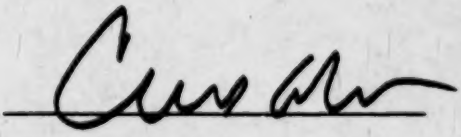
I am the attorney of record for Petitioner in the above-entitled matter.

Said Petitioner is absent from the county in which I have my office and for that reason I am making this verification on his behalf.

I have read the foregoing petition and know the contents thereof.

I am informed and believe that the matters stated therein are true and, on that ground, I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 22, 1983, at San Francisco, California.



CURTIS G. OLER

APPENDIX

Appendix "A" - Memorandum Decision of the United States Court of Appeal for the Ninth Circuit, non-published No. 80-3139, Filed July 13, 1983

Appendix "B" - Order of the United States Court of Appeal for the Ninth Circuit, filed September 28, 1983

Appendix "C" - Opinion of the United States District Court for the District of Oregon dated January 18, 1982

APPENDIX "A"

NOT FOR PUBLICATION

FILED
JUL 13 1983
PHILLIP B. WINBERRY
Clerk US Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANKLIN JEFFERSON, Plaintiff-Appellant, vs. MARTIN R. HOFFMAN, in his capacity as Secretary of the Army; DEPARTMENT OF THE ARMY; LIEUTENANT GENERAL JOHN W. MORRIS, in his capacity as Chief of Engineers, the U.S. Army Corps of Engineers; THE U.S. ARMY CORPS OF ENGINEERS; COLONEL HARVEY L. ARNOLD, JR., in his capacity as District Engineer, Portland District, Corps of Engineers; and PORTLAND DISTRICT, CORPS OF ENGINEERS, Defendants-Appellees.	NO. 82-3139 D.C. NO. CV 77-11 BE MEMORANDUM

Appeal from the United States
District Court for the District of Oregon

Honorable Robert C. Belloni,
United States District Judge, Presiding

Argued and Submitted: July 5, 1983

Before: SNEED, KENNEDY, and FARRIS, Circuit Judges:

The district court's determination of attorneys' fees was appropriately guided by the factors set forth in Kerr vs. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976). The trial court was correct in noting that the Kerr factors may overlap in a particular case, and that they are not all relevant to a particular case in the same degree. There is support for the court's discount of some of the attorneys' time and effort, as being unreasonable and duplicative. The court pointed out that the plaintiff succeeded only on a fraction of the claims he advanced. It found the attorneys' performance in this case less than exemplary. These findings too are supported by the record. We cannot say that the court abused its discretion in setting the fees at $6,000.

AFFIRMED.

APPENDIX "B"

FILED
UNITED STATES COURT OF APPEALS
SEP 28 1983
FOR THE NINTH CIRCUIT
PHILLIP B. WINBERRY
CLERK, U.S. Court of Appeals

FRANKLIN JEFFERSON, Plaintiff-Appellant	NO. 82-3139
vs.	ORDER
MARTIN R. HOFFMAN, in his capacity as Secretary of the Army, et al., Defendants-Appellee	

Appeal from the United States District Court for the District of Oregon

Before: SNEED, KENNEDY, and FARRIS, Circuit Judges:

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed, Kennedy, and Farris have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the

suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRANKLIN JEFFERSON, Plaintiff, vs. MARTIN R. HOFFMANN, in his capacity as Secretary of the Army; DEPARTMENT OF THE ARMY; LIEUTENANT GENERAL JOHN W. MORRIS, in his capacity as Chief of Engineers; THE U.S. ARMY CORPS OF ENGINEERS; COLONEL HARVEY L. ARNOLD, JR. in his capacity as District Engineer, Portland District, Corps of Engineers; and ENGINEERS, Defendants.	CIVIL NO. 77-11 BE OPINION

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Attorneys for Defendant.

BELLONI, Judge:

Plaintiff, a black male, sued the United States Army Corps of Engineers alleging racial discrimination in employment. Six instances of discrimination were alleged. After trial I granted relief with respect to three. The other three allegations I found to be without merit. I awarded plaintiff $6,244.81 plus $6,000 in attorney's fees.

The Court of Appeals for the Ninth Circuit affirmed this decision in all respects save the award of attorney's fees. The court remanded for consideration of the guidelines provided in Kerr vs. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976).

OPINION

I now offer the reasons for my award of $6,000. In doing so I take into consideration the facts and guidelines required by Kerr. However, I do not find it necessary to make detailed findings and precise calculations. See Manhart v. City of Los Angeles Department of Water and Power, 652 F.2d 904, 908 (9th Cir. 1981).[1]

Title VII allows an award of reasonable attorney's fees to prevailing parties. 42 U.S.C. § 2000e-5(k) (1976). There is no question in this case that plaintiff is a "prevailing party" for the purposes of this action. Sethy vs. Alameda County Water District, 602 F.2d 894, 897-98 (9th Cir. 1979). The issue is what constitutes a reasonable amount for attorney's fees.

Kerr outlined a number of factors that should be considered in determining what amount of fees is reasonable.

They are

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal services properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship of the client, and (12) awards in similar cases.

526 F.2d at 70. Although I have considered each of the twelve factors in making my award I will discuss in detail only a few of them, since the factors are somewhat redundant and since some of them are not particularly relevant here.

A. Time and labor required considering the difficulty of the case.

Plaintiff's attorneys spent an enormous number of hours on this case. They did so completely without reason. For example, in consulting with the client alone the two

attorneys, Curtis G. Oler and Keith Raines, consumed 697 hours. This is the equivalent of four solid months of a full time attorney's working life. This case is not that difficult. It contains no novel issues of law. Even the facts, although numerous, were not particularly complex. There was no need to spend this much time talking with the client.

Mr. Oler reports he spent nearly 50 hours "reviewing" court documents, including spending several hours reading the four-page opinion of this court. He also reports that 60 hours were required to answer 25 interrogatories. After reviewing the inerrogatories, which appear to have been answered by plaintiff himself, I find it difficult to understand why 60 hours were required.

A substantial portion of Mr. Oler's time was spent attempting to extricate himself from a conflict with this district's local rules. The defendant is certainly not re-

quired to pay for Mr. Oler's inability to comply with local procedure. In any event, the hearing on Mr. Oler's activities concerned his handling of this and fourteen other suits. It would not be proper for the defendant in this case to pay for the entire amount of time spent on this issue.

Finally, there appears to be a great deal of duplication of effort in this case. On a number of occasions both attorneys appeared at hearings and status conferences when the appearance of one would have sufficed. Both attorneys request compensation for spending 43 hours talking with one another. Both attorneys submit requests for compensation for preparing objections to exhibits and final arguments. The list goes on. There was no reason at all of this duplication of effort. I am not required to compensate for the work of two attorneys when the work of one would have sufficed. Copeland vs. Marshall, 641

F.2d 880, 891, (D.C. Cir. 1980).

B. The amount involved and the results obtained.

Plaintiff originally requested $250,000. He was awarded $6,000. He originally presented six different discrimination claims. He prevailed on only three. Plaintiff's request for permanent injunction, twice urged upon this court, was twice rejected. In a word, plaintiff was not very successful in this lawsuit. And although this does not affect his status as a "prevailing party," it does affect the amount of attorney's fees that will be considered reasonable, for the general rule is that the attorney's fee award should be proportionate to the extent to which plaintiff prevails. Molina vs. Richardson, 578 F.2d 846, 854 N. 16 (9th Cir. 1978); Schaeffer v. San Diego Yellor Cabs, Inc., 462 F.2d 1002, 1008 (9th Cir. 1972).

C. Skill, experience, and customary fees.

In spite of the experience of the two lawyers, the representation they provided was not beneficial to this case. I am allowed to adjust attorney's fees awards when the quality of representation is "unusually good or bad." Copeland, 641 F.2d at 893. Here the quality of representation was unusually bad. Therefore, it is not appropriate to award the customary fee here. Mr. Oler requests up to $100 per hour. A rate of about half that much is in order. Indeed, that would line up with Mr. Oler's previous awards in this district. See, e.g., Guidry v. Alexander, No. 78-39 RE (D. Or. Oct. 29, 1981).

Mr. Oler also appears to have something of a "flat rate" for court appearances. He charges, for example, $350-400 for status conferences and $750 for attendance at hearings. The problem is that these charges are totally out of proportion to the time spent in court.

The status conferences were quite brief, never lasting more than an hour, including waiting time. The hearings were never more than two hours. Even if Mr. Oler had done an exemplary job of representing plaintiff I would consider his charges, which come to about $375 per hour, unreasonable. The same is true of his trial time, billed at a straight $1,000 per day.

Mr. Raines's rate of $35 per hour is quite reasonable.

CONCLUSION

In view of the excessive amount of time plaintiff's lawyers spent on this case, the small extent to which plaintiff actually succeeded, the quality of the representation, the duplication of effort and the excessive amount of the requested rate, I find that reasonable attorney's fees are considerably less than the amount requested. The original $6,000 award is adequate.

As for the claim for post-judgment attorney's fees, I find no reason to make any further award. Plaintiff did not prevail on appeal. Indeed, this has already been determined by the court of appeals on plaintiff's request for costs. Even if this were not the case, the only issues on which it could possibly be said that plaintiff succeeded was that of attorney's fees. With respect to obtaining attorney's fees for litigating the attorney's fee issue, the ninth circuit in Manhart held that ordinarily attorneys should be compensated for "the time spent to establish a reasonable fee." 652 F.2d at 909. Where the attorneys attempt to establish an unreasonable fee, however, compensation seems inappropriate. This interpretation of the ninth circuit's holding is buttressed by Manhart's reference to Lund vs. Affleck, 587 F.2d 75, 77 (1st Cir. 1978). In that case the Court of Appeals for the First Circuit

said that "if the attorneys' initial claims are exorbitant . . . the district court should refuse further compensation." Since the initial claim for attorney's fees in this case was plainly exorbitant, I find no need to award further compensation.

Dated this 18 day of January, 1982.

/s/ Robert C. Belloni
United States District Judge

Footnotes

1 Harman vs. San Diego County, 80-5282 (Dec. 21, 1981) is not to the contrary. There the Court of Appeals for the Ninth Circuit said that where there is great disparity between the amount of fees requested and the amount awarded the trial court cannot simply recite that the Kerr factors have been considered. Here I make no such brief recital. I offer a detailed consideration of the relevant Kerr factors.

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No. 83-1047

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANKLIN JEFFERSON, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found that there was a sufficient basis on which to conclude that the district court did not abuse its discretion in limiting to $6,000 an award of attorney's fees to petitioner.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not reported. The opinion of the district court (Pet. App. C1-C11) is not reported. An earlier opinion of the court of appeals (App., *infra*, 1a-2a) is not reported. Two earlier opinions of the district court (App., *infra*, 3a-6a, 7a-11a) and two judgment orders of the district court (App., *infra*, 12a, 13a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1983, and a petition for rehearing was denied on September 28, 1983 (Pet. App. B1-B2).

The petition for a writ of certiorari was filed on December 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a black male employed by the United States Army Corps of Engineers, brought this action in the United States District Court for the District of Oregon, alleging that the Corps had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, by discriminating against him on the basis of race.[1] In his complaint petitioner alleged six different respects in which the Corps allegedly had discriminated against him.[2] Following a trial, the district court held that the Corps had discriminated against petitioner in three respects, *i.e.*, by restricting his use of sick and annual leave, by placing him on leave without pay status, and by harassing him.[3] The court rejected petitioner's claim that

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[1] Petitioner initially submitted his allegations of discrimination to the Corps' District Engineer. The District Engineer determined that petitioner had not been subjected to racial discrimination, and the agency affirmed that determination in 1975. The Civil Service Commission affirmed the agency decision in 1976. App., *infra*, 7a-8a.

[2] In 1978, the district court preliminarily enjoined the Corps from terminating petitioner during the pendency of the action. The court subsequently denied a permanent injunction. In January 1980, the district court, on petitioner's ex parte motion, temporarily restrained the Corps from terminating him. The court dissolved that order in February 1980. See Pet. App. C7; App., *infra*, 5a.

[3] The court subsequently held that petitioner was entitled to receive 364 hours of accumulated sick leave, 240 hours of accumulated annual leave, and the sum of $6,244.81, covering compensation for additional annual leave, leave without pay, and expenses incurred to obtain medical certification in connection with sick leave. App., *infra*, 4a-6a, 12a.

the Corps had discriminated against him in the assignment of work, in the allocation of overtime, or in his suspension from work for presenting altered sick leave slips. App., *infra*, 9a-10a. Pursuant to 42 U.S.C. 2000e-5(k) and 16(d), under which courts are authorized to award reasonable attorney's fees to prevailing parties in Title VII suits, petitioner moved for an award of attorney's fees in the amount of $90,752.70.[4] The district court awarded attorney's fees of $6,000. Pet. App. C2; App., *infra*, 12a, 13a.

2. On the initial appeal the court of appeals affirmed on all issues except the award of attorney's fees. App., *infra*, 1a-2a. The court of appeals remanded the issue of attorney's fees for consideration in light of the guidelines set out in *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976). App., *infra*, 2a. On remand the district court noted that it had considered each of the factors set out in *Kerr*, and it discussed in some detail the factors it viewed as particularly relevant to the determination in this case. Pet. App. C4. The court noted, inter alia, the excessive number of hours spent on the case (including 697 hours for consultation with the client, 60 hours in answering 25 interrogatories, and 43 hours for consultation between petitioner's counsel), the fact that petitioner had not prevailed on three of his claims and had twice failed to obtain a permanent injunction, the court's judgment that the quality of petitioner's representation was "unusually bad," and

---

[4] Following the initial appeal, petitioner requested an additional $14,032.20 in attorney's fees. The petition states (at 8, 21, 25) that the total attorney's fees requested amounted to $112,000.

its conclusion that certain flat rates charged by one of petitioner's counsel were "totally out of proportion to the time spent in court." *Id.* at C4-C9.

3. The court of appeals affirmed, noting that the determination of attorney's fees was appropriately guided by the factors listed in *Kerr* v. *Screen Extras Guild, Inc.*, *supra*, and that there was support in the record for the district court's findings concerning the unreasonable and duplicative nature of some of the hours claimed, petitioner's lack of success on many of his claims, and the "less than exemplary" performance of his counsel. The court of appeals concluded that it was unable to say that the district court had abused its discretion in setting the fees at $6,000. Pet. App. A1-A2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 9-14) that the court of appeals erred in not requiring a calculation of attorney's fees based on a reasonable number of hours and a reasonable rate, citing *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983). But in *Hensley* the Court did not hold that such a calculation is always necessary; instead, it stated that "[t]here is no precise rule or formula" for determining whether a fee award should be adjusted downward (slip op. 12). The Court also stressed that the district court "necessarily has discretion in making this equitable judgment" (*ibid.*).

In any event, it seems clear that the district court did make a calculation of reasonable attorney's fees in this case. The court concluded that rates of $35

per hour for Mr. Raines and $50 per hour for Mr. Oler were reasonable. It rejected Mr. Oler's rate of $100 per hour and his flat rates for court appearances and explained why the rates appeared unreasonable. Pet. App. C8-C9. The district court also concluded that the number of hours claimed should be reduced because it included excessive and duplicative claims, of which the court gave several examples (*id.* at C4-C6), and it described other factors, such as degree of success and quality of representation, that indicated the need for further discounts (*id.* at C7-C8).[5] The court of appeals found sufficient support in the record for all of these findings. Although the district court did not provide a precise explanation of how it computed the total of $6,000, it provided enough information to allow the court of appeals to conclude that the district court used the correct standards and that the amount of the award did not reflect an abuse of discretion. Pet. App. A2. In these circumstances, the district court's failure to explain each and every step in its calculation cannot be characterized as reversible error.

2. Petitioner also contends (Pet. 14-24) that the district court failed to articulate clearly the reasons for the attorney's fees it awarded. That contention is without substance.

Petitioner concedes (Pet. 15-16) that a court is not required to discuss specifically all 12 factors the courts have suggested as guidelines for determination of attorney's fees and that the factors are flexible

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[5] Petitioner's claim that he "prevailed on substantially all claims against defendants" (Pet. 10) is incorrect. As the district court noted (Pet. App. C7), petitioner prevailed on only three of his six discrimination claims, and both of his requests for a permanent injunction were denied.

guidelines that need not be applied mechanically. The district court indicated (Pet. App. C4) that it had considered all 12 of the factors, and, as petitioner acknowledges (Pet. 17), it discussed six of the factors. The district court opinion on its face clearly states the considerations that led the court to reduce very substantially the amount requested for attorney's fees. Nothing in the petition suggests that the district court's conclusions were clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-3035

FRANKLIN JEFFERSON, PLAINTIFF-APPELLANT

vs.

MARTIN R. HOFFMAN, ET AL., DEFENDANTS-APPELLEES

Argued and Submitted—June 11, 1981

Decided—September 2, 1981

On Appeal from the United States District Court
for the District of Oregon
Hon. Robert C. Belloni, District Judge, Presiding

MEMORANDUM

Before: HUG, POOLE and REINHARDT, Circuit Judges.

In this Title VII action, the district court gave judgment awarding Jefferson the money equivalent ($6,244.81) of 604 hours of accumulated annual and sick leave of which he had been deprived by the defendants in violation of the statute. It also awarded him $6,000 (against his claim for $90,000) as attorneys' fees, and dissolved a preliminary injunction which had restrained the defendants from discharging him. When the defendants again threatened his termination for reasons similar to those which had been the subject of the restraint, the court granted a temporary restraining order but dissolved

it some weeks later (having ordered additional fees of $533.30 in connection with the TRO) after the defendants agreed to withdraw the notice of termination.

On appeal Jefferson cites as error a number of rulings all of which we affirm except that relating to the calculation of attorneys' fees.

We find no abuse of discretion in vacating the preliminary injunction and denying the request for a permanent injunction. *Miss Universe Inc.* v. *Flesher*, 605 F.2d 1130 (9th Cir. 1979). The court properly concluded that the defendants had taken steps to prevent reoccurrence of discriminatory acts and that an injunction against future harassment would be difficult to enforce.

Nor did the court abuse discretion in making local counsel primarily responsible for Jefferson's court appearance. *Raiford* v. *Pounds*, 640 F.2d 944 (9th Cir. 1981).

The ruling that Jefferson was not discriminated against in the distribution of overtime was not clearly erroneous. *Smallwood* v. *National Can Co.*, 583 F.2d 419 (9th Cir. 1978).

It was proper to deny compensatory and punitive damages in a Title VII case. *Shah* v. *Mt. Zion Hospital & Medical Ctr.*, 642 F.2d 688 (9th Cir. 1981).

There was no error in limiting the scope of the trial to the events at the John Day Dam. *Smallwood*, *supra*.

On this record we cannot give meaningful review to the reasonableness of the award of attorneys' fees because the district court failed to articulate its resolution of the guidelines outlined in *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975). We remand for that purpose.

REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 77-11

FRANKLIN JEFFERSON, PLAINTIFF

vs.

MARTIN R. HOFFMAN, ETC. ET AL, DEFENDANTS

OPINION

BELLONI, Judge:

This is an employment discrimination case. Plaintiff, a black journeyman crane operator brought suit against his employer, the Army Corps of Engineers. Plaintiff alleged six instances of racial discrimination. This court granted relief with respect to three. They are: 1) harassment; 2) restriction in annual and sick leave usage; and 3) placement on leave without pay status. The parties filed simultaneous briefs concerning the amount of damages and the character of relief.

Specifically, since July 1975, defendants have required plaintiff to produce medical certification for all sick leave usage. When plaintiff was unable to obtain medical substantiation, he was forced to use accumulated annual leave. If plaintiff's annual leave was exhausted, he was placed on leave without pay status. Defendants also required plaintiff to give three days advance notice before using any annual

leave. If plaintiff attempted to use annual leave without the requisite notice, he was placed on leave without pay status. This court found the imposition of restrictions on plaintiff's sick and annual leave usage were not justified.

Remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, encompass injunctive and affirmative relief, "and any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). A full range of equitable remedies is available to the court. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

Since Magistrate Leavy ruled earlier that plaintiff would not be entitled to recover compensatory or punitive damages in this Title VII action, it is unnecessary to discuss those aspects of recovery.

Damages for harassment would be measured in terms of mental distress. As such, they are compensatory in nature, and therefore are not recoverable. Injunctive relief is not appropriate. A broad injunction against harassment would be ambiguous, and difficult to check and enforce.

Regarding sick leave, defendants are ordered to restore all of plaintiff's accumulable sick leave, for the period beginning July 1975 through December 1978. At four hours every two week pay period, for three and a half years, plaintiff is entitled to three hundred sixty-four hours of accumulated sick leave.

With respect to annual leave, defendants are ordered to restore all of plaintiff's annual leave, for the period beginning July 1975 through December 1978, in the following manner. Plaintiff will be restored the maximum two hundred and forty hours of accumulated annual leave. The balance will be paid to plaintiff in a lump sum equal to $4,658.60.

Both the accumulated sick and annual leave is currently available for plaintiff's use.

After reviewing both sides' claims and calculations, plaintiff is entitled to recover $366.21 for his placement on leave without pay status.

In connection with the improper sick leave requirement, plaintiff made numerous trips from The Dalles to visit doctors in Portland. Plaintiff is entitled to recover $1,220.00 for expenses incurred while obtaining the required medical certification.

The court granted plaintiff's motion for preliminary injunction and enjoined defendants from removing plaintiff from his position as crane operator. The preliminary injunction was issued during the pendency of the action. Plaintiff asks that it be made into a permanent injunction, preventing defendants from terminating him in the future. Defendants ask that the preliminary injunction be dissolved.

The preliminary injunction is dissolved. The administrative process stayed by the injunction is allowed to continue. There is no reason to believe defendants and their employees will not do their best to correct the problem areas identified by this court. Defendants have already initiated a program which will improve the situation which led to this action.

Plaintiff has made several requests. First, that this court order his transfer to a metropolitan area, at no loss of seniority, and to a position commensurate with his abilities. Second, that this court order the termination of eight individuals who testified against plaintiff at trial. Both requests are denied. The latter is frivolous.

Additionally, plaintiff claims: 1) medical expenses resulting from tension; and 2) his costs for the

litigation (telephone calls to counsel, motel and automobile expenses). These are denied. Finally, plaintiff's request that this court reconsider and expand its findings is also denied.

Plaintiff is therefore entitled to recover: 1) three hundred and sixty-four hours of accumulated sick leave; 2) two hundred and forty hours of accumulated annual leave, and the sum of $4,658.60; 3) the sum of $366.21; and 4) the sum of $1,220.00 from defendants. The preliminary injunction is dissolved.

The foregoing shall constitute supplemental findings of fact and conclusions of law according to Rule 52(a) of the Federal Rules of Civil Procedure.

Dated this 1st day of August, 1979.

/s/ Robert Belloni
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 77-11

FRANKLIN JEFFERSON, PLAINTIFF

vs.

MARTIN R. HOFFMANN, ETC. ET AL., DEFENDANTS

OPINION

[Filed Apr. 20, 1979]

BELLONI, Judge:

Plaintiff, a black male, has brought suit against his employer, the United States Army Corps of Engineers, alleging discrimination in employment as a journeyman crane operator. This court has jurisdiction under Title VII of the Civil Rights Acts of 1964, as amended, 42 USC § 2000e *et seq.*, and 28 USC § 1343.

Plaintiff was employed at Bonneville Dam by defendants from 1971 to 1974. He is currently employed at The Dalles-John Day dams and has been permanently assigned there since mid-1974.

Plaintiff filed an administrative complaint which gave rise to this action on July 10, 1975. The District Engineer issued his notice of proposed decision on October 23, 1975, which became the final agency

decision on November 10, 1975. Plaintiff appealed to the Civil Service Commission, which issued its decision affirming the agency decision on December 2, 1976. Plaintiff timely filed suit on January 5, 1977.

The court granted plaintiff's motion for preliminary injunction enjoining defendants from removing him from his position as crane operator at The Dalles-John Day dams on February 8, 1978. The preliminary injunction was issued during the pendency of the action.

Plaintiff's complaint alleged that defendants initiated and maintained a continuing pattern of discriminatory actions from 1971 to the present. I have previously limited the trial to those occurring during his employment at the John Day Dam on the ground that the earlier acts are separate and not relevant.

The trial on the merits included the testimony of thirteen witnesses for the plaintiff, and sixteen witnesses for the defendant. The evidence was designed to show racial discrimination as follows:

1) compulsion to perform extra duties consisting of menial and undesirable work assignments;

2) denial of overtime work;

3) improper suspension;

4) continued harassment on the job consisting of, but not limited to, unwarranted close scrutiny of his activities as an employee, and subjugation to ridicule and racial slurs;

5) restriction in the use of sick and annual leave; and

6) placement on leave without pay.

Plaintiff's first three allegations are without merit. Relief will be granted upon the remaining three.

First, plaintiff claims he was compelled to perform menial, undesirable work. Plaintiff's claim is without merit. Plaintiff's job description requires him to perform "other duties as assigned". Such duties may encompass non-crane tasks which are necessary to accomplish the job to which a particular crew has been assigned. All employees, regardless of rank, may be required to do work which could be considered menial or undesirable. The efficient completion of work requires all members of a team to work together toward the goal of completing the work that needs to be done. Testimony showed that plaintiff on occasion, completely refused to do assigned non-crane work, or if he did undertake it, he did it slowly and inefficiently.

Second, plaintiff complains of inequities in the allocation of overtime. The evidence established that plaintiff was not denied overtime in an unfair manner. Assignment of overtime is based on a number of factors, including the employee's availability and willingness to work, and the skills he possesses. Since plaintiff preferred to only operate a crane, while the other crane operators were able and willing to perform non-crane tasks, plaintiff through his own actions limited his amount of overtime.

Third, plaintiff claims he was improperly suspended for sick leave abuse in December 1976. Plaintiff was suspended for presenting questionable medical slips signed by his physician to support his absences from work. There is sufficient evidence justifying plaintiff's suspension.

Fourth, plaintiff alleges that he was the victim of continued harassment. There is sufficient evidence to

support plaintiff's allegation. Significantly, the project engineer directed a secretary not to notify plaintiff of his telephone messages during the day, some of which involved the investigation and processing of his discrimination complaints. This is improper conduct, and is indicative of a discriminatory attitude. Further, since his arrival at The Dalles-John Day dams, plaintiff has been subjected to constant close, unwarranted scrutiny. He has been the victim of racial slurs. The defendants' attempted corrective and preventative measures were ineffective, and made only half-heartedly.

Lastly, plaintiff contends that defendants, without cause, imposed unreasonable restrictions upon his use of sick and annual leave. Plaintiff also challenges instances of his placement on leave without pay status. Since July 1975, defendants have required plaintiff to produce medical certification for all sick leave usage. This resulted in plaintiff having to drive ninety miles from The Dalles to Portland, to obtain substantiation from his physician. When plaintiff was not able to obtain medical substantiation, he was forced to use accumulated annual leave. If plaintiff's annual leave was exhausted, he was placed on leave without pay. Defendant also required plaintiff to give three days advance notice before using any annual leave. If plaintiff attempted to use annual leave without the requisite prior notice, he was placed on leave without pay status.

After considering all the evidence, I find the imposition of the restrictions on plaintiff's sick and annual leave usage were not justified. Consequently, those instances when plaintiff was placed on leave without pay status, resulting from attempted sick and annual leave usage, are also improper. Thus, plaintiff's final two contentions are valid.

Therefore, I find that plaintiff has established a prima facie case of employment discrimination, and that defendants have failed to rebut it by articulating legitimate non-discriminatory reasons justifying its actions.

The parties shall file simultaneous briefs in the amount of damages and the character of relief which is appropriate. These should be filed on May 18, 1979.

The foregoing shall constitute findings of fact and conclusions of law according to Rule 52(a) of the Federal Rules of Civil Procedure.

Dated this 30 day of April, 1979.

/s/ Robert Belloni
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Cv. No. 77-11-BE

FRANKLIN JEFFERSON, PLAINTIFF

v.

MARTIN R. HOFFMAN, ETC. ET AL., DEFENDANTS

[Filed Nov. 19, 1979]

Plaintiff shall recover from defendants:

1. three hundred and sixty-four hours of accumulated sick leave;
2. two hundred and forty hours of accumulated annual leave and the sum of $4,658.60;
3. the sum of $366.21; and
4. the sum of $1,220.00.

The preliminary injunction is dissolved.

Plaintiff shall recover costs. Plaintiff shall also recover attorneys' fees in the sum of $6,000.00.

The remaining portions of this action are dismissed.

Dated: November 19, 1979.

/s/ Robert Belloni
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Cv. No. 77-11-BE

FRANKLIN JEFFERSON, PLAINTIFF

v.

MARTIN R. HOFFMAN, ETC. ET AL., DEFENDANTS

ORDER

[Filed Nov. 19, 1979]

Plaintiff is entitled to attorneys' fees in the sum of $6,000.00.

Dated: November 19, 1979.

/s/ Robert Belloni
United States District Judge

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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 83-1047

In the Supreme Court
OF THE
United States

October Term, 1983

FRANKLIN JEFFERSON,
Petitioner,

vs.

JOHN O. MARSH, SECRETARY OF THE ARMY, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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No. 83-1047

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRANKLIN JEFFERSON, Petitioner.

vs.

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY,
ET. AL., Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER FRANKLIN JEFFERSON

ARGUMENT

I.

Respondent failed to meet the argument that the Court of Appeals erred in not requiring the District Court to calculate reasonable attorneys' fees by multiplying the number of hours reasonably expended on the litigation by a reasonable

hourly rate.

Respondent contends (Rsp.Brief, 4) that the District Court is not required, in every instance, to calculate attorneys' fees based on a reasonable number of hours and a reasonable rate, citing Hensley vs. Eckerhart, 461 U.S. ___, 76 L.Ed.2d 40, 51 U.S.L.W. 4552 (1983). This argument of Respondent is without merit. The clear message from the decisions of this Court is that the only objective way to calculate a reasonable attorneys' fee award is to first multiply the number of hours reasonably expended on the litigation by a reasonable hourly rate. In Hensley this Court stated that such calculation is the "most useful starting place" in determining a reasonable attorneys' fee (51 U.S.L.W. at 4554). In a more recent case, Blum vs. Stenson, ___ U.S. ___, 52 U.S.L.W. 4377, No. 81-1374 (March 21, 1984), this Court

reiterated this view when it concluded that the initial estimate of a reasonable attorneys' fee is properly calculated as the product of the number of hours reasonably expended on the litigation times a reasonable hourly rate (52 U.S.L.W. at 4377, citing Hensley). The District Court in this case never determined what was a reasonable number of hours and utilized no calculation scheme whatever. In fact, the Respondent concedes this point, as it must (Rsp.Brief, 5). The District Court simply, and arbitrarily, set the attorney's fee award at $6,000 (App. D, 12a, and App. E, 13a, of Rsp. Brief). The fee award of $6,000 cannot stand because it invited other courts to arbitrarily and capriciously set attorneys' fees at any level without making a basic fee calculation. This is clearly a result not intended by either Hensley or Blum.

Respondent also contends (Rsp. Brief, 5) that the rate of $50 per hour for the Petitioner's Senior Counsel, Mr. Oler, was reasonable. This contention is without merit. In his request for attorneys' fees Mr. Oler submitted documented evidence, in the form of a Declaration and case authority, to establish the prevailing market rate in the District of Oregon. He submitted evidence of attorneys' fee awards in similar cases in the District of Oregon. He clearly established the rates as between $70 and $150 per hour. Thus, under these circumstances, the allowance of only $50 per hour for Mr. Oler, in light of his skill, reputation and abilities (Pet. 22), was clearly unreasonable.

Since the Court of Appeals failed to require the District Court to make a fee calculation, it committed reversible error.

II.

Respondent failed to meet the argument that the Court of Appeals erred in not requiring the District Court to articulate clear and concise reasons for the fee award.

Respondent also contends (Rsp.Brief, 4-5) that even though the District Court made no fee calculation, it did give sufficient reasons for the $6,000 award. This argument is likewise unpersuasive and clearly avoids the real issues presented. It is clear from this Court's reasoning in Hensley and Blum that after making the initial fee calculation, the District Court must give clear and concise reasons for any upward or downward adjustment thereto (Hensley, supra.). The District Court herein gave several unpersuasive reasons for why it awarded a fee which was so drastically reduced from the $112,000

requested. One reason the Court gave was because of the duplication of work by the Petitioner's two attorneys (Pet.App. C-9). Other reasons given by the District Court included the degree of success and the quality of representation (Pet.App. C-9).

All of the reasons given by the District Court to support the fee award of only $6,000 are merely unsupported conclusions. The fact is that Mr. Oler, a San Francisco attorney, represented Petitioner because no local attorney could be found in Oregon who was willing to handle this employment discrimination case, which the District Court well knew because of other similar cases pending before it. Mr. Oler was required by the Local Rules of the District Court to associate local counsel. Mr. Keith Raines so associated. Both attorneys fully and vigorously prosecuted Petitioner's case. Petitioner prevailed

on three (3) of the six (6) claims he presented. His attorneys obtained a preliminary injunction preventing the termination of his employment, and also obtained, after judgment in his favor, a temporary restraining order preventing Respondent from once again terminating his employment. His attorneys also obtained appropriate monetary damages for him (Pet. 4, 5, 21). Thus, Petitioner's two attorneys obtained "excellent" results for him, and are therefor entitled to be fully compensated therefor. Hensley, supra.; Blum, supra. In seeking reasonable attorneys' fees, Petitioner's attorneys presented complete itemizations and detailed calculations to support their claim of $112,000 which the District Court unjustifiably rejected out-of-hand.

The gross disparity between the $112,000 in attorneys' fees requested and

the $6,000 actually awarded demonstrates that the District Court utilized an erroneous standard for determing what constituted a reasonable fee award. The District Court failed to make a basic fee calculation, and the reasons it gave for reducing the award so drastically to only $6,000 were clearly insufficient. The actual out-of-pocket expenses incurred by Petitoner and his attorneys in litigating this matter exceeded the $6,000 awarded, leaving no real attorneys' fee for the Petitioner's attorneys. Since the District Court failed to apply the proper standard in determining reasonable attorneys' fees, the Court of Appeals could not have conducted a meaningful reveiw of the award. It should have remanded this case to the District Court for the application of the proper standards under Hensley and Blum.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petiton, it is respectfully submitted that the Petiton for a Writ of Certiorari be granted and that the District Court be directed to set a reasonable attorneys' fee based on the standards announced in Hensley and Blum based on the number of hours reasonably expended in this litigation and a reasonable fee rate.

RESPECTFULLY SUBMITTED,

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